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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 56

THE UNITED STATES, PETITIONER,

v.

SWIFT AND COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1930.

No. 56

THE UNITED STATES, PETITIONER,

v.

SWIFT AND COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

Statement of the Case.

The judgment under review is for the recovery of an overpayment of income and excess-profits taxes for 1917. 68 Ct. Cl. 97. The case has been advanced for hearing immediately following Nos. 42 and 43, *United States* v. *Boston Buick Company* and *United States* v. *Iron Cap Copper Company.*

All three cases present this question: Where a taxpayer has overpaid his tax for one year and the overpayment is credited in whole or in part on taxes due

for other years, when does *allowance* of the credit take place?

The question arises in the present case in determining whether one of the two claims for refund relied upon was filed within four years from the time the tax was paid, payment having been effected through the allowance of a credit. In the other cases the question arises in determining the date to which to compute interest on credits.

The lower courts all held that the question was settled by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524.

The respondent in the present case included in its return of net income for 1917 a stock dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., a corporation of Uruguay. (Findings III, IV, V, Rec. 12, 13.) That was before it had been decided that stock dividends are not income within the meaning of the Sixteenth Amendment. (Finding V, Rec. 13.)

Because of the erroneous inclusion of this stock dividend in the respondent's 1917 return of income the amount of income and excess-profits taxes assessed against and collected from it for that year exceeded the amount lawfully owing by $498,961.29. (Finding VI, Rec. 13.)

The Government admits the overpayment. (Br. 2.) The point in dispute is whether recovery of it is barred by Revised Statutes, § 3226, U. S. C., Tit. 26, § 156, for failure to file a sufficient claim for refund within the period prescribed by law—five years from the date when the return was due, Revenue Act of 1921, § 252, or four years from the time the tax was paid, Revenue Act of 1926, § 284, (b) (1).

On February 28, 1923, and admittedly within the

prescribed period, the respondent filed a claim for the refund of income and excess-profits taxes paid for the year 1917 on the ground, amongst others, of "Foreign Dividends Overstated." (Pet., Ex. A, Rec. 8-9; Finding VII, Rec. 13.)

Besides the dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., the respondent received dividends in 1917 from various other foreign corporations, all of which the Commissioner of Internal Revenue treated as income of the respondent for 1917 to the extent of the earnings of the respective corporations for that year. Under the claim for refund filed February 28, 1923, the respondent contended before the Commissioner that none of these dividends should be included in its income for 1917 for a common reason, namely, that in each instance the dividend had been specifically declared out of earnings for years prior to 1917, and there being earnings for those years sufficient for the purpose, the dividend should be treated as income of the respondent for those years, and not for 1917, under § 1211 of the Revenue Act of 1917 as construed by the Circuit Court of Appeals for the Second Circuit in *Douglas* v. *Edwards*, 298 Fed. 229. On April 24, 1926, this contention was overruled by the Commissioner, this Court having reversed the decision of the Circuit Court of Appeals on November 23, 1925, 269 U. S. 204, 70 L. ed. 235. (Finding VIII, Rec. 13.)

Thereafter, on September 3, 1927, the respondent filed a second claim for refund by way of amendment of the first, alleging therein that the dividend of $2,068,000 received from the Compania Swift de Montevideo, S. A., was improperly included in its taxable income for 1917 because it was a stock dividend and

therefore not taxable under the Acts of Congress. (Pet., Ex. B, Rec. 10-11; Finding IX, Rec. 14.)

If, as the Government contends, the second claim cannot be treated as an amendment of the first, whether as an independent claim it was filed in time depends upon when the last payment of 1917 taxes was made.

The last payment by the respondent of income and excess-profits taxes for 1917, amounting to $2,813,012.05, was effected by the Commissioner's allowing as a credit that much of an overpayment of 1918 taxes, under authority of § 252 of the Revenue Act of 1921. (Finding X, Rec. 14.)

The proceedings in connection with the allowance of the credit were as follows: Under date of February 9, 1923, the Commissioner, in accordance with the established procedure, signed and forwarded to the Collector of Internal Revenue for the First District of Illinois a Schedule of Reductions of Tax Liability (Form 7777), later called Schedule of Overassessments, in which was included an overassessment of income and excess-profits taxes for 1918 found to have been made against the respondent in the amount of $10,304,753.94.[1] At the same time he forwarded to the Collector undated Certificates of Overassessment addressed to the respective taxpayers named in the schedule and showing the amount of the overassessment against each. On July 25, 1923, the Collector returned this schedule to the Commissioner, and also made a report on a Schedule of Refunds and Credits (Form 7805A), showing on both what portions of the overas-

[1] This reduction in the 1918 tax liability was due principally to deducting a large 1919 net loss pursuant to § 204 (*b*) of the Revenue Act of 1918.

sessments were overpayments, if any, and how the overpayments should be distributed as between credits and refunds, according to his books. With respect to the overassessment of $10,304,753.94 against the respondent, the Collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment certain amounts were applicable as credits against taxes due for other periods, including an item of $2,813,012.05, the amount of an additional assessment of income and excess-profits taxes for 1917; and that the balance, $735,028.10, was refundable. At the same time that these schedules were forwarded by the Collector to the Commissioner the Collector returned to the Commissioner the Certificates of Overassessment in the cases of the taxpayers named on the Schedule of Refunds and Credits, including the respondent. Thereafter, under date of September 6, 1923, the Schedule of Refunds and Credits was signed by the Commissioner, the Deputy Commissioner having first signed it; and under date of September 26, 1923, the Certificate of Overassessment addressed to the respondent, showing the amount of the overassessment, and the portion thereof abated, the portion allowed as a credit, and the portion allowed as a refund, was mailed to the respondent and duly received. (Findings XI, XII, Rec. 14-16.)

It is stipulated that—

> "If the claim for refund filed February 28, 1923, either alone or in connection with the claim filed September 3, 1927, is sufficient in law, or if the claim filed September 3, 1927, independently of and apart from the claim filed February 28, 1923, was filed within the time required by law, there is due and owing the plaintiff on account of overpayment by it of income and

war excess-profits taxes for the taxable year 1917 a refund of $498,961.29, together with interest at the rate of 6 per cent per annum from the date of the overpayment, to wit, the date on which the credit of $2,813,012.05 referred to in finding X, above, became effective." (Finding XVI, Rec. 17.)

Decision of Court of Claims.

The Court of Claims rejected the original claim for refund filed February 28, 1923, as inadequate in failing to allege specifically as a ground of claim that the dividend in question was a stock dividend, but held that the claim filed September 3, 1927, admittedly sufficient in its statement of the ground of claim, was filed within the prescribed period of four years from the date of payment of the tax, and accordingly gave judgment for the amount of the overpayment with interest as provided by law.

As the last payment of 1917 taxes was made by applying an overpayment of 1918 taxes as a credit (*ante*, 4), whether the claim filed September 3, 1927, considered independently of the original claim, was filed within the four years depends upon when the credit was allowed or took effect as a payment. The Court of Claims held, on the authority of *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524, that the credit was allowed not earlier than September 6, 1923, when the Commissioner approved the Schedule of Refunds and Credits showing the portions of the 1918 overpayment that should be credited and refunded, respectively, as reported by the Collector.

Summary of Argument.

I. In accordance with the decision of the Court of Claims, the respondent maintains that under the law as construed by this Court in the *Girard Trust Company Case* neither a credit nor a refund is allowed until the Commissioner, after signing and transmitting to the Collector the Schedule of Overassessments, receives back the Collector's report showing what part of the over*assessment* listed in the Schedule of Overassessments was an over*payment* and, if any, how much should be credited against taxes for other years and how much refunded, and "makes it effective by his approval"—September 6, 1923, in the present case.

The Government on the other hand, disregarding the settled distinction between the determination of an overassessment and the allowance of a credit or refund, maintains that a credit is allowed when the Commissioner signs the Schedule of Overassessments—February 9, 1923, in the present case.[1]

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[1] The argument for the Government throughout, both in this case and in Nos. 42 and 43, discloses a misapprehension of the respondents' contention and the rulings below on this point. For example, in this case it speaks of the respondent as contending and the Court of Claims as holding that the credit was not allowed "until the Commissioner signed the authorization to the Disbursing Clerk to pay the amounts which appeared to be refundable on the Schedule of Refunds" (No. 56, Govt. Br. 6-7, 8), and in Nos. 42 and 43 it speaks of the Circuit Court of Appeals as "holding that the allowance of a credit occurred when the Commissioner of Internal Revenue certified to the Disbursing Clerk of the Treasury that the amounts shown to be refund-

As the Collector keeps the accounts with the taxpayer, until his report is received the Commissioner does not even know whether there has been any overpayment out of which to allow a credit, or, if there has been an overpayment, whether there are any unpaid assessments against which to credit it, so that the Government's contention, if adopted, would put the Commissioner in the position of allowing a credit not only when he does not know what amount to allow, but when the Collector's report in some cases would show no overpayments at all and therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there were one.

The Government's contention was rejected as contrary to the decision in the *Girard Trust Company Case*, not only by the Court of Claims in this case, but by the District Court of Massachusetts in Nos. 42 and

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able on a Schedule of Refunds, Form 7805-A, should be paid." (Govt. Br. 6-7.)

No such contention or decision was made. What the respondents in all three cases contended for and what the lower courts decided was that a credit, like a refund, is allowed when the Collector's report on the Schedule of Refunds and Credits showing the amount subject to credit and the amount refundable is *approved* by the Commissioner. The signing of the Schedule of Refunds and Credits underneath the authorization to the Disbursing Clerk to make payment of the amounts shown to be due as refunds or as interest on credits was only the symbol of the Commissioner's approval of the Collector's report. (See *post*, 22.) He could have indicated his approval in other ways, or, as observed by the Circuit Court of Appeals, 35 F. (2d) 563, it might even be implied from the course of business.

43, *Boston Buick Co.* v. *United States,* 27 F. (2d) 395, Brewster, J., and *Iron Cap Copper Co.* v. *United States,* 31 F. (2d) 628, Morton, J., and by the Circuit Court of Appeals, First Circuit, affirming the judgments in those cases, 35 F. (2d) 560.

Subsequent to the decision in the present case additional cases involving the date of allowance of a credit came before the Court of Claims, and after reexamining the whole question it reached the same conclusion, Judge Littleton, lately Chairman of the Board of Tax Appeals, writing the opinions. (*West Leechburg Steel Co.* v. *United States,* 69 Ct. Cl. 461, 40 F., 2d., 131; *Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 40 F., 2d., 136; *Pottstown Iron Co.* v. *United States,* 69 Ct. Cl. 427, 40 F., 2d., 142; *Revolution Cotton Mills* v. *United States,* — Ct. Cl. —, 41 F., 2d., 898; *Andrews Steel Co.* v. *United States,* — Ct. Cl. —, 42 F., 2d., 573.)

In no case in which the question was contested has any different view been expressed. The Government's brief mentions faintly *Penn Smokeless Coal Co.* v. *United States,* 34 F. (2d) 205, in the District Court for Western Pennsylvania. But the point was not in controversy there, the Government's brief in that case stating: "Counsel for the plaintiff and for the Government are agreed that a credit is allowed when the Commissioner approves the Schedule of Overassessments for transmission to the proper accounting officer for credit." (*Penn Smokeless Coal Co.* v. *United States,* U. S. Dist. Ct. W. Dist. Pa. No. 5668 L., Deft's Reply Brief, p. 3a.)

Furthermore, as shown in the opinion of the Court of Claims in the present case (Rec. 19), and that of the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases,* 35 F. (2d) 563,

what the Pennsylvania court supposed was "the rule laid down in *Girard Trust Co.* v. *United States,*" and upon which it expressly based its conclusion that a credit is allowed when the Schedule of Overassessments is signed, was the text of a Treasury regulation which this Court had quoted only to reject as an erroneous interpretation of the statute!

II. Where the tax is paid by the allowance of a credit the statutory period of four years from the date of payment of the tax within which to file claims for refund does not start running until notice of the allowance is received by the taxpayer, which in the present case was not earlier than September 26, 1923, the date of the Certificate of Overassessment.

III. Regardless of whether the claim filed September 3, 1927, considered as an independent claim, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period, was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, or could be made sufficient by amendment as well after the expiration of the period of limitations as before.

The Argument.

Point I.

The credit by means of which respondent made the last payment of 1917 taxes was allowed September 6, 1923, when the Commissioner of Internal Revenue approved the Collector's report showing the amounts of the 1918 overassessment subject to credit and refund, respectively, so that the claim for refund filed September 3, 1927, fell within four years from the date of payment of the tax.

1. THIS COURT DECIDED IN GIRARD TRUST CO. v. UNITED STATES, 270 U. S. 163, THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER, AFTER TRANSMITTING TO THE COLLECTOR THE SCHEDULE OF OVERASSESSMENTS, RECEIVES BACK AND APPROVES THE COLLECTOR'S REPORT ON THE SCHEDULE OF REFUNDS AND CREDITS SHOWING WHAT PART OF THE OVERASSESSMENT WAS AN OVERPAYMENT AND IF ANY HOW MUCH SHOULD BE CREDITED AND HOW MUCH REFUNDED.

The *Girard Trust Company Case* involved the meaning of the words "to the date of such allowance" in § 1324 (a) of the Revenue Act of 1921 providing that "upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit * * * to the date of such allowance."

The Court first stated the general rule for determining what constitutes an allowance of a claim for credit or refund:

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit

> should be granted, and when *he* has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (270 U. S. 170, 70 L. ed. 528.) [Italics ours.]

It then rejected the Government's contention that a credit or refund was allowed under the Revenue Act of 1921 when the Commissioner decided that there had been an overassessment and signed and forwarded to the Collector a Schedule of Overassessments, with instructions to examine his books and report back the amounts, if any, that should be credited or refunded. On this point the opinion states:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, who made the collection and keeps the account with the taxpayer." (270 U. S. 170-171, 70 L. ed. 529.)

If only the Commissioner has authority to allow a claim for credit or refund, and if his decision that there has been an overassessment and his signing of the Schedule of Overassessments and forwarding it to the Collector for a report as to the amounts that should be credited or refunded does not constitute an allowance of the claim, of necessity there can be no allowance until some further act by the Commissioner. The opinion states what that is:

> "The findings and the exhibits show that the course of business is that the collector on receiving from the Commissioner the schedule as to

> the overassessment, examines his books and reports back to the bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the assistant commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund cannot be paid. This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.)

While only refunds were directly involved in the *Girard Trust Company Case*, the Court, as the quoted passages show, expressly put credits on the same footing as refunds for the purpose of determining the date of allowance, and laid down the same rule for both, namely, that the Commissioner "has allowed the claim for the refund *or credit*," not when he "first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue," but only after the collector "examines his books and reports back to the Bureau the amount which should be *credited* on taxes due and the amount to be refunded," and the Commissioner "by his approval" makes that report "effective."

The Government's brief dismisses these statements, in a foot-note (Nos. 42, 43, Govt. Br. 33), as *dictum*. But they are not, because even though the Court had not in express terms put claims for credit on the same footing as claims for refund as regards what constitutes allowance, that would have followed as a necessary consequence from the ground of the decision.

The ground of the decision was that a claim for refund is allowed when the amount is fixed finally

by competent authority, namely, the Commissioner of Internal Revenue:

> "This we think [the Commissioner's approval of the Collector's report] is the real date of allowance. Until that time the exact *amount* of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.) [Italics ours.]

As the allowance of a claim for refund and the allowance of a claim for credit are acts of exactly the same nature and effect—adjudications by the Commissioner of Internal Revenue against the United States for taxes overpaid (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—if a claim for refund is allowed when the amount is fixed finally by the Commissioner, the same must be true of a claim for credit.

The Government's brief seems to us to concede this when it states that "the word 'allowance' is used similarly in regard to both credits and refunds." (Nos. 42, 43, Govt. Br. 20; also 25-26.) This Court having held that allowance in connection with refunds means the final determination by the Commissioner of the amount to be refunded, if used similarly in connection with credits it must mean there the final determination by the Commissioner of the amount to be credited.

Furthermore, the language of the statute itself is, "*Upon the allowance* of a claim for refund *or credit* * * * interest shall be * * * paid upon the total *amount* of such refund *or credit* * * * to the date of such allowance" (*ante*, 11), clearly showing that in the mind of Congress when either a credit or a refund is allowed the amount has been determined.

The rule that a claim for overpayment of taxes is allowed when the amount to be returned is determined by the Commissioner of Internal Revenue was not new with the *Girard Trust Company Case*. In *United States* v. *Kaufman*, 96 U. S. 567, 24 L. ed. 792, the nature and effect of the allowance of a claim for overpayment of taxes was stated as follows:

> "* * * the allowance of a claim under this statute is equivalent to an *account stated* between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the *adjudication* by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a prima facie liability of the Government; but when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached." (96 U. S. 570-571, 24 L. ed. 793.) [Italics ours.]

And again in *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. ed. 908:

> "An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a *statement of accounts* by one having authority for that purpose under an act of Congress." (104 U. S. 734, 26 L. ed. 909.) [Italics ours.]

There can be no statement of account, of course, until the amount due is determined.

That a claim is settled or allowed when the amount due is determined by the officer or tribunal authorized by law to make the settlement or al-

lowance has been the rule from the beginning, not alone with respect to claims for overpayments of taxes, but with respect to all classes of claims against the United States for money or money's worth.

In *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 60 L. ed. 609, the construction of the words "final settlement"[1] in the Act of August 13, 1894, as amended (33 Stat. 811), authorizing subcontractors to bring suit on the contractor's bond, "if no suit should be brought by the United States within six months from the completion and final settlement of said contract," was involved. The present Chief Justice, delivering the opinion of the Court, reviewed the whole course of legislative and administrative practice relating to what constitutes the settlement or adjustment of a claim by or against the United States, saying in part:

> "The word 'settlement', in connection with public transactions and accounts, has been used from the beginning to describe *administrative determination of the amount due.* * * * By the Act of March 3, 1817 (3 Stat. at Large 366), it was provided that 'all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Treasury Department.' This provision was carried into § 236 of the Revised Statutes. The

[1] "Settlement" and "allowance" mean the same thing in connection with claims against the United States. Indeed, as just seen, it was expressly stated in *United States* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908-909, that allowance by the Commissioner of Internal Revenue of a claim for overpayment of taxes is "but a *statement of accounts* by one having authority for that purpose under an act of Congress." [Italics ours.]

words 'settled and adjusted' were taken to mean the *determination* in the Treasury Department for administrative purposes *of the state of the account and the amount due.* * * *

"We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the *appropriate administrative determination with respect to the amount due.* We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the *amount* which it was finally bound to pay or entitled to receive was *fixed administratively by the proper authority.*" (240 U. S. 219-221, 60 L. ed. 614.) [Italics ours.]

The rule operates with even greater force in the case of claims for credit or refund of illegally collected taxes than in the case of ordinary claims, because, as shown later (*post*, 40-42), the very provision of law which authorizes the Commissioner to allow credits and refunds of illegally collected taxes expressly contemplates that the amount due the taxpayer shall be ascertained before the allowance is made.

The *Girard Trust Company Case* establishes another point with respect to when a credit is allowed. Where, as in that case, part of the overpayment is applicable as a credit against other taxes and part is refundable, the amount of the refund, being simply the balance of the overpayment remaining after the amount of the

credit has been determined by the Commissioner,[1] becomes fixed the instant that determination is made.

If, then, the amount of the refund in the *Girard Trust Company Case* was not fixed finally by competent authority until the Commissioner approved the report of the Collector it must have been because until that time the amount of the credit had not been fixed finally by competent authority. Therefore, in deciding when the amount of the refund in that case was fixed finally by competent authority the Court necessarily decided also that the amount of the credit was fixed finally by competent authority at the same time. And the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* so held, saying:

> "While it is true that the issue involved in the Girard Trust Company Case related only to the date of the allowance of a refund, the court, though by way of *dictum;* as it may be argued, also as definitely fixed the time of the allowance of credits. Its *dictum* as to the time of allowance of credits was, we think, an in-

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[1] Section 252 of the Revenue Act of 1918 provided: "That if, upon examination of any return of income * * * it appears than an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any *balance of such excess shall* be immediately refunded to the taxpayer * * *." [Italics ours.] This provision was reenacted without material change in the Revenue Act of 1921, § 252, in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322.

> evitable conclusion from its finding as to the time of allowance of a refund, since the amount to be refunded is absolutely determined when the credits are allowed." (No. 42, Rec. 22; 35 F., 2d, 562.)

Thus, the *Girard Trust Company Case* is not only conclusive of the proposition that a claim for credit, like a claim for refund, is not allowed until the amount is fixed finally by the Commissioner, but also of the proposition that where, as in the present case, part of the overpayment is applicable as a credit and part is refundable, the allowance of the credit and the allowance of the refund necessarily take place at the same time because the respective amounts are fixed finally at the same time.

Moreover, the Government presented the case on the theory that there is no difference between a claim for refund and a claim for credit from the standpoint of what constitutes allowance. Thus, contending for the date of the Commissioner's approval of the first schedule as the date of allowance, the Solicitor General's brief stated:

> "The right to refund or *credit* * * * was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit. This, of course, takes time if the interests of the Government are to be fully protected. Whichever it may be, the total of principal and interest received by the claimant is the same, and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or refund, remains the date of the approval of the original schedule." (Sup. Ct., Oct. Term 1925, No. 137, *Girard Trust Co.*

v. *United States*, Brief for United States, pp. 13-14.) [Italics ours.]

And after the case was decided, fixing a later date as the date of allowance, namely, the date of the Commissioner's approval of the Schedule of Refunds and Credits, the Treasury Department at first treated the decision as applicable to claims for refund and claims for credit alike (T. D. 3850, head-note 1, Cum. Bul. V-1, p. 354, reproduced below[1]), just as it had formerly treated the date on which the Commissioner signed the Schedule of Overassessments as the date of allowance of claims for refund and claims for credit alike.[2]

Again, in *Blair, Comr.* v. *United States ex rel. Birkenstock*, 6 F. (2d) 679, affirmed by this Court, 271 U. S. 348, 350, 70 L. ed. 983, 984, on the authority of the *Girard Trust Company Case*, the brief for the Government, replying to a contention by the taxpayer that there might be a difference between credits and refunds as regards the date of allowance, observed:

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[1] "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and refunds is the date of final approval by the Commissioner and not the date when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." [Italics ours.]

[2] Thus, Regulations 62, Art. 1040, provided: "A claim for refund *or credit* is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for *credit* or refund." [Italics ours.] Regulations 65, Art. 1371, contained the same provision.

> "Under the contention of counsel for the petitioners the schedule sent to the Collector is an allowance in the case of a credit, but is not an allowance in the case of a refund. A single word in an Act cannot have one meaning when applied to one set of facts and another meaning when applied to another set of facts; *the word 'allowance' cannot refer to one action of the Commissioner when applied to a credit and to another action when applied to a refund.*" (Ct. App. D. C., Jan. Term 1925, No. 4246, Br. for Appellant p. 23.) [Italics ours.]

These passages from the Government's briefs in prior cases are quoted not, of course, merely to show inconsistencies in argument, but to show that it was the understanding of law officers and Treasury officers alike that claims for credit and claims for refund stand on the same footing as regards what constitutes allowance.

After regretting in the Court below the decision in the *Girard Trust Company Case,*[1] the Government now says that that decision supports its position that a credit is allowed when the Commissioner signs the Schedule of Overassessments.

The argument is that the *Girard Trust Company Case* "construed the word 'allowance' involved here to mean 'authorization,' " and decided that the refund

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[1] "The difficulty in this case seems to have arisen by reason of the language in the *Girard Trust Company Case.* It is submitted that if the Supreme Court had fully appreciated in that case how the *rule adopted* would affect credits and involve the whole subject in confusion, a different result might have been obtained." (Govt. Br., Court of Claims, *Swift and Co.* v. *U. S.,* Motion for New Trial, page 10.) [Italics ours.]

was allowed when the Commissioner signed the authorization to the Disbursing Clerk to make payment; and that by analogy "a credit is allowed when the Commissioner gives the direction to the Collector to make the credit." (Nos. 42, 43, Govt. Br. 22, 25-26, 29-32.)

This argument concedes that the principle of the decision in the *Girard Trust Company Case* is controlling as to what constitutes the allowance of a claim for credit as well as a claim for refund, so the issue narrows down to what that decision was.

It was *not* the authorization to the Disbursing Clerk to make payment that constituted the allowance of a claim for refund under that decision. The ground of the decision was that a claim for refund is allowed when the amount is fixed finally by competent authority, namely, the Commissioner of Internal Revenue, and that that takes place, under the course of business in the Commissioner's office, when the latter approves the Collector's report on the Schedule of Refunds and Credits. "This, we think," quoting from the opinion, "is the real date of allowance." "Until that time the exact amount of the refund is not fixed finally by competent authority." (*Ante*, 13-14.)

By what means the Commissioner manifests his approval, whether by signing a notice to the Disbursing Clerk that payment may be made, or by some other appropriate act, is merely a question of form and has nothing to do with the principle of the decision. If he had signed the schedule over an inscription reading, "The amounts shown herein as due the respective taxpayers by way of credit or refund are hereby approved and allowed," there can be no doubt that this would have constituted an award or allowance, so complete, indeed, that suit could be brought upon it if payment

were refused. (Compare *United States* v. *Kaufman*, 96 U. S. 567, 24 L. ed. 792; *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. ed. 908; *United States* v. *City of Louisville*, 169 U. S. 249, 42 L. ed. 735.)

But assume that the ground of decision in the *Girard Trust Company Case* was that the Commissioner's notice to the Disbursing Clerk that payment might be made constituted the allowance of the refund. At the time of that notice the amount of the refund had been fixed finally by the Commissioner. Similarly, under the reasoning of the *Girard Trust Company Case*, before any authorization from the Commissioner to the Collector to enter a credit in the taxpayer's account could take effect as the allowance of a credit the amount of the credit would have to be fixed finally by the Commissioner. (*Ante*, 13-14.)

2. THE CONTENTION THAT THE COMMISSIONER'S APPROVAL OF THE SCHEDULE OF REFUNDS AND CREDITS RELATED ONLY TO REFUNDS.

It is contended that the signing by the Commissioner of the Schedule of Refunds and Credits could not constitute an allowance of a credit because what appeared immediately above his signature contained no reference to credits but was merely a notice to the Disbursing Clerk of the Treasury that the refunds found due might be paid. (No. 42, 43, Br. 16-17.)

This takes too literal a view of the matter. The schedule, as the Collector's certificate indicates, is a report of the amounts subject to credit as well as the amounts subject to refund, as shown by the Collector's books. Moreover, what the Commissioner subscribed was a notice to the Disbursing Clerk that not only the

refunds, but interest on the credits[1] might be paid, and his signature at that place, by necessary implication, if not expressly, constituted his approval of the findings of his subordinates as therein set forth with respect to overpayments made by the taxpayers named, and the amounts that should be credited and refunded, respectively.

This Court so construed the action of the Commissioner in the *Girard Trust Company Case*. Thus, referring to the Collector's report to the Commissioner showing "the amount which should be credited on taxes due and the amount to be refunded," the opinion states, "that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." (270 U. S. 171, 70 L. ed. 529.)

Likewise the Court of Claims:

> "* * * the defendant argues that when the commissioner signs the schedule of refunds and credits he only authorizes the disbursing clerk to pay the amount of tax shown to be refundable and the interest upon any refund or credit, and that this cannot be regarded as the taking of a credit. We think by this action the commissioner does more than merely authorize the payment of the refund and the interest. *He approves the report of the collector,* finally determines that there has been an overpayment, and makes effective a credit of that overpayment

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[1]The Government's brief states: "Neither in this certificate nor in the columns referred to is any mention made directly or indirectly of credits. (Nos. 42, 43, Br. 17.) Column 6 shows the interest due on both refunds *and credits.* (See Schedule of Refunds and Credits, Column 6, Govt. Br., Nos. 42, 43, Appendix B-2.)

against the additional tax for another year." (*Pottstown Iron Co.* v. *United States*, 69 Ct. Cl. 427, 434; No. 113, in this Court, Rec. 22.) [Italics ours.]

The Government's brief admits that the Commissioner, before signing the Schedule of Refunds and Credits, checks the Collector's adjustments thereon. (Nos. 42, 43, Br. 13.) In another place it is implied that this review is limited to refunds. But the findings show that the review included items reported by the Collector as subject to credit as well as those subject to refund. (No. 43, Rec. 26.)

Let it be supposed, however, that the signing by the Commissioner of the Schedule of Refunds and Credits constituted an allowance of refunds only. Allowance of credits would then have to be sought in some other act of the Commissioner subsequent to the receipt of the Collector's report.

It would have to be sought in some other act of the *Commissioner*, because he "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." (*Girard Trust Company Case, ante*, 11-12.) And the act must be *subsequent* to the Collector's report, because until then, as elsewhere shown, the Commissioner had neither the necessary information nor the authority to allow a credit. (*Post*, 29-30, 40-42.)

In other words, as stated by the Court of Claims in the *Pottstown Iron Company Case*, the credit in such case would be allowed "by whatever action the Commissioner takes in approving the report of the Collector." (69 Ct. Cl. 435; No. 113, Rec. 23.) One such act is the mailing by direction of the Commissioner to each taxpayer listed in the Schedule of Refunds and

Credits of a Certificate of Overassessment showing the amount of the overassessment abated, credited, or refunded. In the present case that was done September 26, 1923. (Finding XII, Rec. 16.)[1]

As supporting its contention that the signing by the Commissioner of the Schedule of Refunds and Credits did not constitute an allowance of a credit, the Government points to a finding in the *Iron Cap Copper Company Case* that where no refunds, and no credits on which interest must be paid, were listed on a Schedule of Refunds and Credits, the instructions were to

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[1]The Government quotes a portion of a finding in the *Iron Cap Copper Company Case,* No. 43, reading: "If the entire amount of the overassessment was either abated or credited the collector was instructed to mail the original certificate of overassessment to the taxpayer." (Nos. 42, 43, Br. 12.) The very next paragraph of the findings shows, however, that this procedure was soon found to be incomplete, and that "Collectors were accordingly instructed in any case in which any portion of an overassessment was to be either refunded *or credited* to return the original certificates of overassessment and to include the list of credit items on the subsidiary schedule." (No. 43, Rec. 23-24.)

Again it is stated that: "The signing of the certificate of overassessment by the Deputy Commissioner precedes the signing of the schedule of overassessments by the Commissioner. It is prepared and signed before the credit is allowed." (Nos. 42, 43, Br. 14.) But, at the time the certificate of overassessment is signed by the Deputy Commissioner the amounts to be abated, credited or refunded do not appear thereon, and could not, because, as the findings show, at that time the Commissioner's office did not know whether there would be any credit or refund at all, much less the amount. (No. 43, Rec. 28.)

file the schedule without its being signed by the Commissioner. (Nos. 42, 43, Br. 24.)[1]

Inasmuch as the statute has provided for interest on credits ever since the Schedule of Refunds and Credits came into use,[2] such a case would be very unusual, and as Mr. Justice Story said in *United States* v. *Dickson*, 15 Pet. 141, 164, 10 L. ed. 689, 698, "to put an extreme case is not a good test of the fair and just interpretation of any statute."

It will be time enough to decide what constitutes the allowance of a credit under such exceptional circumstances when the occasion arises and all the facts are presented. (Compare *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 731, 73 L. ed. 918, 928.)

It is sufficient now to repeat that it is the Commissioner's *approval* of the Collector's report which this Court held constituted allowance of a claim for credit or refund in the *Girard Trust Company Case* (*ante*, 13), and such approval might be indicated in other ways than by signing the Schedule of Refunds and Credits. As just stated, it might be indicated by the mailing of the Certificate of Overassessment notifying the taxpayer of the amount credited, or it might be implied from the course of business. (*Ante*, 25-26.)

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[1] No such finding was made in the *Boston Buick Company Case* nor in this case.

[2] Interest on refunds and credits was first provided for in the Revenue Act of 1921. The Schedule of Refunds and Credits came into use in February, 1923. (No. 56, Finding XIII, Rec. 16-17.)

3. THE CONTENTION THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government rests its case on the argument that a credit is allowed when the Commissioner signs the Schedule of Overassessments *because at that time the Commissioner makes his final decision that the overpayment shall be applied as a credit*, leaving, as it is said, only routine or ministerial acts to be done to make the credit effective. (Nos. 42, 43, Govt. Br. Points I, II, pp. 10, et seq.)[1]

The argument, if valid at all, would apply equally to refunds, and is in fact the very argument that was made in the *Girard Trust Company Case*, without success, to support the proposition that refunds and credits alike are allowed when the Commissioner signs the Schedule of Overassessments. Thus, referring to the signing of that schedule by the Commissioner, the Government's brief in that case stated: "The right to refund or credit * * * was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit." (*Ante*, 19.)

What the Government is really doing, therefore, is rearguing the *Girard Trust Company Case*.

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[1] The argument is summed up in the sentence: "* * * the allowance is a decision by competent authority that the credit *should* be made." (Ibid, 22.) [Italics ours.]

Waiving that, however, we answer:

a. *A determination that there has been an overassessment is not an allowance of a credit or refund.*

The fundamental error in the Government's position here, as it was in the *Girard Trust Company Case,* is its failure to distinguish between the determination of an overassessment and the allowance of a credit or refund.

The provision of the Schedule of Reductions of Tax Liability (later called Schedule of Overassessments) the signing of which by the Commissioner is alleged to have constituted an allowance of a *credit* in this case is the same provision the signing of which by the Commissioner was alleged to have constituted an allowance of a *refund* in the *Girard Trust Company Case,* and is set forth in the Special Findings of Fact, par. XI. (Rec. 14-15.)

It does not even purport to be an allowance by the Commissioner of either a credit or a refund. It is, as it says, an allowance of a "reduction of tax liability," a determination of an overassessment.

This distinction goes to the root of the matter. Deciding that there has been an overassessment is only the first step in the allowance of a credit or refund. The opinion in the *Girard Trust Company Case* expressly states that the proceedings leading up to the allowance of a credit as well as of a refund only "began" with that action. (270 U. S. 164-165, 70 L. ed. 526.)

Before the Commissioner can allow a credit or refund, it still has to be determined, *first,* what part of the over-*assessment,* if any, has been paid; *second,*

what unpaid assessments there are against the taxpayer for other years; and *third,* whether such unpaid assessments, if any, are legally collectible in whole or in part.

None of these things had been determined when the Commissioner signed the Schedule of Overassessments. At that time the Commissioner did not know, as the text of his authorization to the Collector shows (Finding XI, Rec. 14-15), whether or not there had been any overpayment out of which to allow a credit or refund, nor, if there had been an overpayment, whether there were any unpaid assessments for other years to be set off, if legally collectible; and he did not get that information until the Collector returned the Schedule of Overassessments together with a report showing the state of the taxpayer's account. As aptly stated by the Court of Claims:

> "The signing of the schedule of overassessments by the commissioner in the first instance and the making of a report by the collector to the commissioner as to the status of the taxpayer's accounts are steps preliminary to making a credit effective. In the matter of credits the collector of internal revenue is merely the bookkeeper who reports the condition of the taxpayer's accounts to the Commissioner of Internal Revenue for final action." (*Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 569.)

Not only, therefore, was a credit not allowed when the Commissioner signed and forwarded to the Collector the Schedule of Overassessments, but it was impossible for the Commissioner to have made the allowance at that time. To hold that he did would put him in the position of allowing a credit—of *adjudicating* that the United States is indebted to the taxpayer

(*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—not only when he did not know how much to allow but when in many cases the Collector's report would show that the United States owed the taxpayer nothing.

The distinction between the determination of an overassessment and the allowance of a credit or refund was the foundation of the decision in the *Girard Trust Company Case.*

It was also the basis of the decisions below in the present cases:

> "The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This cannot be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated." (Op. Ct. Cl., No. 56, Rec. 20-21.)

> "The commissioner, who is the final arbiter in such matters, when he determines that there has been an overassessment has no knowledge of what the status of any taxpayer's account is, whether it will disclose that there has been an overpayment and, if so, whether there will be any sums due from the taxpayer for other periods to which the overpayments should be credited, or whether the overpayment must all be refunded." (Op. C. C. A., No. 42, Rec. 21; No. 43, Rec. 39.)

That the determination of an overassessment, or even an overpayment (which is a step farther along), does not carry with it the allowance of a credit or refund, but that the latter is a separate and distinct act, has likewise been decided by the Board of Tax Ap-

peals. The statute gives the Board jurisdiction in certain cases to determine whether a taxpayer has made an overpayment, and the question arose whether that carried with it jurisdiction to allow a credit or refund in those cases. The Board held not, saying:

> "*It would seem unnecessary to point out the distinction between a determination that the taxpayer has made an overpayment of tax and a determination that the taxpayer is entitled to a credit or to a refund.* The statute grants the Board jurisdiction to determine that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner determined the deficiency, and then, so far as jurisdiction of the Board is concerned, becomes silent. The remainder of the provision is administrative, directing as it does that such overpayment shall be credited or refunded under certain circumstances. It gives the Board no jurisdiction to determine whether such circumstances exist." (Appeal of *Dickerman & Englis, Inc.*, 5 B. T. A. 633, 635.) [Italics ours.]

The Government relies especially upon the clauses in the Schedule of Overassessments authorizing the Collector to ascertain whether any part of the overassessment was an overpayment, and if so, to apply the overpayment as a credit on any taxes due for other periods and enter the balance as refundable. "This was the authorization which the Government contends was the *allowance* of a credit." (Nos. 42, 43, Br. 15.)

That could be so only by delegation to the *Collector* of authority to allow a credit, because, as we have seen, at the time the Commissioner signs this authorization he does not know whether or not there will be a credit. (*Ante*, 30.)

As this Court has decided (*Girard Trust Company Case, ante,* 11-12), and as the Government's brief states in another place (Nos. 42, 43, Br. 17-18), authority to allow both credits and refunds is vested exclusively in the Commissioner. And being judicial in nature (*United States* v. *Kaufman,* 96 U. S. 567, 570, 24 L. ed. 792, 793; *United States* v. *Real Estate Savings Bank,* 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *Louisville,* 169 U. S. 249, 253, 42 L. ed. 735, 737), it cannot be delegated by the officer in whom the statute has vested it. (*Martin* v. *Mott,* 12 Wh. 19, 31-32, 6 L. ed. 537, 541; *The Floyd Acceptances,* 7 Wall. 666, 676-677, 19 L. ed. 169, 173-174; *Runkle* v. *United States,* 122 U. S. 543, 557, 30 L. ed. 1167, 1171; *In re Giles,* 21 Fed., 2d, 536, 537; *Birdsall* v. *Clark,* 73 N. Y. 73, 29 Amer. Rep. 105, 106; *Lewis* v. *Lewis,* 9 Mo. 183, 43 Amer. Decs. 540, 543-544; *Mechem on Public Officers,* §§ 567, 568.) Indeed, even where the act is ministerial or executive in its nature, if, as here, the law expressly requires it to be done by a particular officer it cannot be delegated to another. (35 Op. A. G. 15, 21; *Mechem on Public Officers,* §568.)[1]

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[1]Of course, the Commissioner could delegate to a subordinate the business of ascertaining from the taxpayer's accounts what part of the overassessment was an overpayment, and, if any, how much should be credited and how much refunded. But that is a very different matter from delegating to the subordinate authority to make his findings effective as an award or allowance. That requires the action of the Commissioner himself, as held in the *Girard Trust Company Case.* (*Ante,* 11-12.)

Compare cases like *Guarantee Co.* v. *Mechanics Bank & Trust Co.,* 173 U. S. 582, 43 L. ed. 818, holding

Be that as it may, these clauses, which directed the Collector to ascertain and enter on the taxpayer's account not only the amount of the overpayment applicable as a credit but also the amount refundable,[1] were considered in the *Girard Trust Company Case*. If effective as an allowance of a claim for credit they would be equally effective as an allowance of a claim for refund. This Court, however, as we have seen, treated the entries made by the Collector pursuant thereto not as entries of credits or refunds which had

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that a judgment of a court for money or money's worth is not final until the amount is fixed *by the court*. In that case the Bank brought suit against the Guarantee Company to recover an amount alleged to be due under two bonds insuring the Bank against loss on account of the fraudulent acts of one of its officers, Schardt by name. The Guarantee Company denied liability. The lower court adjudged that it *was* liable to the extent of the penalty of each bond, with interest, less the amount of "collections realized on assets or collaterals turned over to the Bank by Schardt to reimburse it," and a Master was appointed to ascertain and report the amount of such collections. It was held this was *not* a final decision, because—"Notwithstanding the company's defenses were adjudged to be bad in law, it remained for the circuit court by proper orders to accomplish the object of the suit, namely, *to ascertain the amount* for which the plaintiff was entitled to judgment and execution." (173 U. S. 586, 43 L. ed. 820.) [Italics ours.]

[1] "The balance, if any, of the overpayment will be entered in Column 12 and placed in Column 4 of the subsidiary schedule referred to above, and an appropriate memorandum made upon the taxpayer's account." (Nos. 42, 43, Rec. 6; No. 56, Finding XI, Rec. 14.) The Government's brief quotes only the clause relating to credits. (Nos. 42, 43, Br. 15.)

been finally allowed, but as provisional or interlocutory entries—as findings of "the amount which *should* be credited on taxes due and the amount *to be* refunded," requiring the approval of the Commissioner to make them effective. (*Ante*, 13.)

Recognizing the fundamental conflict between this statement of the matter by this Court and its own position in the present cases, the Government questions the correctness of the Court's construction of the Commissioner's direction to the Collector in the Schedule of Overassessments and the Collector's action thereunder, saying in its brief in the Circuit Court of Appeals in the *Iron Cap Copper Company Case:*

> "This is an incorrect statement for the reason that the collector does not report the amount that 'should' be credited and refunded." (P. 53.)[1]

To support this assertion the Government quotes the language of the Collector's certificate on the Schedule of Overassessments that "the amounts indicated *have been applied* as abatements and credits." (Nos. 42, 43, Govt. Br. 31.) The certificate also stated that

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[1]The challenge is softened in the Government's brief here so as to read: "This is not a correct statement of the practice shown to be in effect in the instant cases, for the reason that the Collector does not report the amount that 'should' be credited and refunded." (Nos. 42, 43, Br. 31.) This comes to exactly the same thing because the directions from the Commissioner to the Collector in the Schedule of Overassessments in the *Girard Trust Company Case* were the same as in the instant cases, and as the Government's brief in Nos. 42 and 43 itself shows (p. 31), the Collector's report pursuant to these directions was word for word the same.

"the amounts refundable *have been determined.*" (*Ibid.*)

The short answer is that the statement represents this Court's judgment of the effect of the language used and the acts done by the Commissioner and the Collector, respectively, and was the only possible construction consistent with the Court's conclusion that under the statute there could be no allowance of a claim for refund or credit until the amount to be allowed had been fixed finally by the Commissioner.

Moreover, the language of the Collector's certificate on the Schedule of Overassessments must be read along with that of the certificate on the Schedule of Refunds and Credits, which goes to the Commissioner at the same time that the Schedule of Overassessments is returned.

The certificate on the Schedule of Refunds and Credits, which was on a form prepared by the Commissioner, refers to the entries made by the Collector at this time as items that "*appeared* for refund or credit,"[1] and proceeds, "An examination of the ac-

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[1] The entire sentence reads: "The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue." (Nos. 42, 43, Govt. Br., Appendix B-2.) As shown below (*post*, 37-38, foot-note 1), no items "appeared for refund or credit" when the Schedule of Overassessments left the hands of the Commissioner. Necessarily, therefore, the items referred to must be those entered by the Collector on the Schedule of Overassessments and certified to the Commissioner on the Schedule of Refunds and Credits as items "subject to refund or credit."

counts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability *subject* to refund or credit" (Nos. 42, 43, Govt. Br. Appendix B-2), plainly indicating that these entries required the approval of the Commissioner to make them effective.

In construing an act or document or a series of acts or documents their whole purport must be taken into consideration, without giving too much weight to "any specific phrase," and regardless of "minutiæ of expression." (*United States* v. *New York Central R. Co.*, 279 U. S. 73, 79, 73 L. ed. 619, 621.)[1]

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[1]How impossible it is to take literally all the language of these printed forms is shown by a paragraph in the Commissioner's authorization to the Collector on the Schedule of Overassessments, reading: "The amounts listed in Column 4 as overassessments (or reductions of tax liability), and the related claims, if any, are allowed in the respective amounts indicated by the 'Certificates of Overassessment' or 'Notices of Adjustment of Claim for Abatement' attached thereto." (No. 42, Rec. 6; No. 43, Rec. 12.) At that stage of the proceedings, however, the amounts to be allowed on the claims for refund or credit had not been ascertained, and the Certificate of Overassessment showed only the amount of the overassessment as found by the Commissioner. (No. 56, Finding XI, Rec. p. 14; Finding XII, Rec. p. 16.) It was not known then whether the taxpayer was entitled to any refund or credit at all, much less the amounts to be allowed. (*Ante*, 30.) Not until after the Collector had received the Schedule of Overassessments and had ascertained from an examination of the taxpayer's account whether any part of the overassessment was an overpayment, and, if any, how much should be credited on unpaid taxes for other years and how much refunded, were

In *Stotesbury* v. *United States*, 146 U. S. 196, 36 L. ed. 940, the Commissioner of Internal Revenue had signed a schedule of claims for the refunding of erroneously collected taxes at the foot of a certificate reading:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined *and allowed*, and are transmitted to the Secretary of the Treasury for his consideration and advisement." (146 U. S. 196, 36 L. ed. 941.) [Italics ours.]

And the question was whether this constituted a final allowance of the claims.

Conceding that "the power of final decision is vested in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury," and that the only effect of transmitting the schedule to the latter was to afford him an opportunity to give advice if he desired (146 U. S. 200, 36 L. ed. 942), the Court nevertheless held that the sending of the schedule to the Secretary even for this limited purpose indicated that the Commissioner had made no final decision though the certificate signed by him stated that the claims *have been allowed.*

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the amounts to be refunded and credited, respectively, entered on either the Schedule of Overassessments or the Certificate of Overassessment. (No. 56, Findings XI, XII, Rec. 15, 16.)

Again, the Certificate of Overassessment informs the taxpayer that, "The amount of the overassessment *will be* abated, credited or refunded as indicated below." (No. 43, Rec. 14.) Yet at the time that certificate goes to the taxpayer the credit or refund had already been allowed in any possible view of the matter

Even less could the signing by the Commissioner of the Schedule of Overassessments have been a final allowance of the claim for credit in the present case, because not only was the schedule transmitted to another officer for a report, but until that report was received the Commissioner did not know what amount to allow as a credit, or whether the taxpayer was entitled to any credit at all for that matter.

The Government's brief states that the "schedule of overassessments is the only word with reference to credits which passes from the Commissioner to the Collector." (Nos. 42, 43, Br. 19.)

On the contrary, *after* both that schedule and the Schedule of Refunds and Credits had been signed by the Commissioner, the Certificates of Overassessment addressed to the respective taxpayers, and upon which now appeared the amounts allowed by the Commissioner by way of credit or refund, "were dated and returned to the Collector for mailing to the taxpayers." (No. 56, Finding XI, Rec. 14-15.)

Certainly, this was notice to the Collector, as it was to the taxpayer, that a credit or refund, or both, had been allowed. Indeed, it is fair to assume that the very purpose of this procedure was to notify the Collector of the Commissioner's final action in the matter; otherwise the natural course would have been for the Commissioner's office to forward the Certificate of Overassessment directly to the taxpayer.

b. A credit can not be allowed until the amount is fixed finally by the Commissioner, and that had not been done at the time the Schedule of Overassessments was signed.

As already shown, there can be no allowance by the Commissioner of Internal Revenue of either a credit

or a refund until the amount has been fixed finally by him. (*Ante*, 13-19.)

At the time the Commissioner signed the Schedule of Overassessments he not only had not fixed the amount of the credit, but, as just seen, he did not even know whether there had been any overpayment out of which to allow a credit, or whether there were any unpaid assessments against which to credit an overpayment if there had been one. (*Ante*, 30.)

It is argued that even in the case of refunds, under the practice prevailing since January 1927, the Commissioner has no information as to the amount to be refunded at the time he purports to make the allowance. (Nos. 42, 43, Br. 19.)

If this be so it is a defiance of this Court's decision in the *Girard Trust Company Case* that a refund is not allowed within the meaning of the statute until the amount is fixed finally by competent authority. True, the Revenue Act of 1926, § 1116 (*b*) (2), provided, on the suggestion of the Treasury, that refunds should be regarded as allowed on the date when the Schedule of Overassessments was signed. But in the very next Revenue Act, that of 1928, § 614(c), this provision was repealed, leaving the law as this Court had declared it in the *Girard Trust Company Case* in full force.

c. The Commissioner had no authority to allow a credit at the time he signed the Schedule of Overassessments.

Prior to the passage of the Revenue Act of 1918 the authority now vested in the Commissioner to credit an overpayment of taxes for one year on taxes due and unpaid for another year did not exist. (A. R. M. 123, Cum. Bul. No. 4, pp. 330-332; L. O. 1106, Cum. Bul. 1-2, p. 221; S. M. 4170, Cum. Bul. IV-2, pp. 102, 103.)

Section 252 of that Act granted such authority in the following terms:

> "That if, upon examination of any return of income * * * *it appears* that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *." [Italics ours.]

This provision was reenacted verbatim in the Revenue Act of 1921, § 252, and without material change in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322. There is no other law on the subject. (L. O. 1106, Cum. Bul. I-2, p. 221.)

Thus, no authority has ever existed under the law to allow a credit *until* "it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due," or in the language of the later acts, *until* it appears that "there has been an overpayment of any income, war-profits or excess-profits tax."

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289, 73 L. ed. 379, 385. See also *Farrell* v. *United States*, 99 U. S. 221, 224, 25 L. ed. 321, 322.)

This limitation upon the authority to allow a credit was early recognized by the Bureau of Internal Rev-

enue itself. Opinion 957 of the Solicitor of Internal Revenue held:

> "* * * It [Revenue Act of 1918, § 252] provides only for the allowance of the credit when 'it *appears* that an amount of income, war profits, or excess profits tax has been paid in excess of that properly due.' * * * It is only the amount of the excess which can be credited against assessments upon another return and the amount of the excess can only be known when the merits of the claim for refund have been determined. It is clear then that the word 'appears' as used in this section is equivalent to '*has been ascertained.*'" (Cum. Bul. No. 1, pp. 256, 257.) [Italics ours.]

Now, at the time the Commissioner, in whom alone authority to allow credits is vested, first decided that there had been an overassessment and signed and forwarded to the Collector a schedule thereof, it had *not* been ascertained that the amount of tax paid was in excess of that properly due. As already seen (*ante*, 29-39), the Commissioner's decision that there had been an over-*assessment* was not a decision that there had been an over*payment*. That depended upon what part, if any, of the tax assessed had been paid, and what part, if any, had been abated. In other words, it depended upon the state of the taxpayer's account, and that account was kept by the Collector. (*Girard Trust Company Case*, 270 U. S. 171, 70 L. ed. 529.)

It follows that until the Schedule of Overassessments was returned to the Commissioner with the Collector's report showing whether there had been an overpayment, and if so, the amount of it, the Commissioner *had no authority* under the law to allow a credit.

4. THE CONTENTION THAT THE PRACTICE OF THE BUREAU OF INTERNAL REVENUE HAS BEEN TO TREAT A CREDIT AS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government maintains that the Bureau of Internal Revenue has consistently taken the position that a credit is allowed when the Commissioner signs the Schedule of Overassessments, and that Congress has impliedly ratified this administrative construction by subsequently reenacting the statute without substantial change. (Nos. 42, 43, Br. 33-36.)

The reference is to part of Article 1040 of Regulations 62 promulgated under the Revenue Act of 1921, reading:

> "A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer, for credit or refund." (Nos. 42, 43, Br. 35.)

That, however, is the identical article of the regulations which was invoked in the *Girard Trust Company Case* as determinative of the date of allowance of a refund, and was rejected because inconsistent with the law. (270 U. S. 169, 171, 70 L. ed. 528, 529; *ante*, 12.) To quote again what the Court said:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, * * *." (270 U. S. 170-171, 70 L. ed. 529.)

If, as we have sought to show, the law as declared by this Court requires that the amount be fixed finally by the Commissioner before a claim for credit as well as a claim for refund can be deemed allowed, no practice of the Bureau of Internal Revenue could make the allowance of a credit, any more than the allowance of a refund, take place when the Commissioner signs the Schedule of Overassessments, because at that time the Commissioner, so far from having fixed the amount of the credit, does not even know that there will be one. (*Ante*, 30.)

But assume the administrative construction relied upon had not already been rejected by this Court. The rule that the reenactment without substantial change of a statute previously construed by the appropriate administrative department constitutes a legislative approval of the administrative construction is applicable only under the following conditions: (a) the statute must be ambiguous (*Iselin* v. *United States*, 270 U. S. 245, 251, 70 L. ed. 566, 570; *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 377-378); (b) it must be "capable of the construction given to it" (*Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237, 22 L. ed. 80, 81), i. e., the administrative construction must not be "plainly erroneous" (*United States* v. *Missouri P. R. Co.*, 278 U. S. 280, 73 L. ed. 377), but must be "reasonable and do no violence to the letter or spirit of the provisions construed" (*Brewster* v. *Gage*, 280 U. S. 336, 74 L. ed. 462); and (c) the administrative construction must have been long-continued and consistent (*Iselin* v. *United States*, 270 U. S. 251, 70 L. ed. 570).

Not one of these conditions is met in the present case, much less all.

a. The statute is not ambiguous.—At the time the words in controversy, "allowance of a claim for the refund of or credit for internal revenue taxes," were used in § 1324 (a) of the Revenue Act of 1921 they had acquired a clear and settled meaning. This Court itself, as before noted (*ante*, 15), had defined the allowance of such a claim by the Commissioner of Internal Revenue as "the equivalent of an account stated between private parties" (*United States* v. *Kaufman*, 96 U. S. 567, 570, 24 L. ed. 792, 793), or "a statement of accounts by one having authority for that purpose under an act of Congress" (*United States* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *City of Louisville*, 169 U. S. 249, 253, 42 L. ed. 735, 737); which necessarily implies a determination by the Commissioner of the amount due the tapayer. Even if any other reasonable meaning could be ascribed to the words it must be presumed, under a familiar rule, that Congress used them in the Revenue Act of 1921 in the sense adopted by this Court in construing earlier statutes in *pari materia*.

b. The statute is not capable of the construction given to it by Article 1040 of Regulations 62.—As we have shown, when the Commissioner signed the Schedule of Overassessments he did not even know whether there had been any over*payment* out of which to allow a credit, or, if there had been an overpayment, whether there were any unpaid assessments against which to credit it, so that under the construction of the statute expressed in Article 1040 of Regulations 62 the Commissioner would be put in the impossible position of allowing a credit not only when he does not know what amount to allow, but when the collector's report in some cases would show no overpayment at all and

therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there had been one. (*Ante*, 30-31, 40.)

When administrative practice is inconsistent with a reasonable interpretation of the law neither long usage nor considerations of convenience can save it.

In *United States* v. *Dickson*, 15 Pet. 141, 10 L. ed. 689, cited with approval in *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 378, the controversy was over the meaning of the phrase "any one year" in the Act of April 20, 1818, providing for the compensation of receivers of public moneys. The claimant contended that it meant any year beginning with the date of his commission. The Government contended that it meant any calendar year, the calendar year then being the fiscal year, and had been so construed in practice ever since the act was passed—a period of more than twenty years. And stressing, as in the present case, the alleged ill consequences of departing from the administrative practice, the argument proceeded—that all the public accounts, including those of receivers of public money, were kept on the calendar year basis; "that if any other mode of keeping the accounts were adopted, it would introduce delays, embarrassment and confusion into the department, and take away the only adequate means of ascertaining from time to time the exact financial state thereof, as to debts, and credits, and disbursements, which is so essential to the public security, and regular operations of the Government;" and that "in order to give full effect to this system it is necessary, in all laws of this character, to construe the year to mean the fiscal year." (15 Pet. 160, 10 L. ed. 697.) But, though it had been consistently followed for twenty years, this Court rejected the administrative construction because not in

accordance with the law, saying through Mr. Justice Story:

> "The construction so given by the Treasury Department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the laws by any department of the executive government, is necessarily exparte, without the benefit of an opposing argument, in a suit where the very matter is in controversy; * * *. * * * it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." (15 Pet. 161-162, 10 L. ed. 697.)

c. The administrative construction has been neither long-continued nor consistent.—Article 1040 of Regulations 62 had not been in force two years when it was challenged in the *Girard Trust Company Case* (instituted August 11, 1923), with the result already stated. If, as the Government states (Nos. 42, 43, Br. 34), "Many cases have been closed in accordance with this departmental regulation," that has been done in the face of this Court's decision overruling the regulation on grounds applicable to refunds and credits alike. (*Ante*, 11-13.)

Nor has the administrative construction been consistent.

On the one hand Article 1040 of Regulations 62 provided, as stated, that a claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the Schedule of Overassessments. (*Ante*, 43.)

But turning to that schedule, it will be seen that it did not even purport to be an allowance by the Commissioner of a credit or refund. It was merely an allowance of a "reduction of tax liability"—a determination of an overassessment—which is but the first step in the allowance of a credit or refund. (*Ante*, 29.)

Again, under the early practice, as found in the *Iron Cap Copper Company Case*, "before the Commissioner could prepare a Schedule of Credits • • •, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid." (No. 43, Rec. 28.) This is entirely inconsistent with the position that a claim for credit is allowed when the Schedule of Overassessments is signed because at that time the Commissioner had no information as to taxes paid or taxes owing by the claimant. (*Ante*, 29-30, 40.)

Similarly, Solicitor's Opinion 106 held—

> "that where the allowance of a credit as provided in section 252 of the Revenue Act of 1918 is being considered by the Commissioner, the credit is made or allowed only when the Commissioner signs and forwards to the collector a formal statement or direction or assessment list *showing the amount of the tax to be collected over and above the amount of the credit.*" (Cum. Bul. No. 4, pp. 339, 341.) [Italics ours.]

Again, Treasury Decision 3260 stated:

> "Upon receipt of such schedules [Schedules of Overassessments] the several collectors of

> internal revenue shall immediately check the items thereon against the accounts of the several taxpayers concerned and determine whether the several amounts of overassessments *should* be abated, refunded, or credited against assessments remaining unpaid." (Cum. Bul. No. 5, p. 243, 244.) [Italics ours.]

If the Commissioner had considered a credit as allowed when he signed the Schedule of Overassessments, certainly he would not have instructed the Collector upon receipt of the schedule, to determine "whether the several amounts of overassessments *should* be abated, refunded or credited."

Again, in the Schedule of Refunds and Credits on which the Collector made his report to the Commissioner after receiving the Schedule of Overassessments and examining the taxpayer's account, the amounts set forth as due the taxpayer by way of credit or refund were described in the certificate of the Collector as items that "*appeared* for refund or credit," and as items "*subject* to refund or credit." (Govt. Br. Nos. 42, 43, Appendix B-2.)

Again, the Certificate of Overassessment, which was not dated nor forwarded to the taxpayer until after the Schedule of Overassessments had been signed by the Commissioner and transmitted to the Collector and returned, states:

> "The amount of the overassessment *will* be applied as follows: * * * if the tax has been paid, the amount of the overpayment *will* either be credited * * *, etc., etc." (No. 43, Rec. 14.)

Again, Treasury Decision 3850, head-note 1, stated:

> "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and

> refunds is the date of final approval by the Commissioner and *not* the date when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." (Cum. Bul. V-1, p. 354.) [Italics ours.]

After remaining in force about five months Treasury Decision 3850 was revoked by Treasury Decision 3919. (Cum. Bul. V-2, p. 209.)

Thus, far from being clear or consistent, the administrative view as to when a credit is allowed within the meaning of the statute has always been badly confused.

It is argued further that Congress not only impliedly ratified the administrative practice embodied in Article 1040 of Regulations 62 by reenacting the statute without substantial change, but that in the Revenue Act of 1926 "it gave express approval of this practice after it was aware that in the *Girard Trust Company Case* the practice and interpretation of the Bureau had been challenged." The reference is to § 1116 (b) (2) of the Revenue Act of 1926, providing that "the term 'date of the allowance of the refund' means * * * the first date on which the Commissioner signs the schedule of overassessments in respect thereof." (Nos. 42, 43, Govt. Br. 36.)

This was not a ratification of the administrative construction of the law as it had previously stood. It was a *change in the law*, as the Government's brief elsewhere recognizes.[1]

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[1] "By § 1116 (b) (2) of that Act, Congress *changed the law* as stated by the Girard Trust Company Case, and declared that a refund was allowed when the Commissioner signed the Schedule of Overassessments." (Nos. 42, 43, Br. 27.) [Italics ours.]

But it is of no importance here which it was, as it was repealed in the very next revenue act, that of 1928, § 614 (c).

The Government explains the repeal by saying that the date of allowance of a refund had lost its significance because by a change in the law interest on refunds was no longer to be computed to the date of allowance. (Nos. 42, 43, Br. 36.) Why the provision was repealed is immaterial, but an equally plausible reason is that Congress had had brought to its attention the impossibility of the Commissioner's allowing a refund at a time when he not only did not know how much to allow but did not know whether any refund at all was due.

5. THE CONTENTION THAT ONLY MINISTERIAL ACTS REMAINED TO BE DONE AFTER THE COMMISSIONER SIGNED THE SCHEDULE OF OVERASSESSMENTS.

With respect to the argument that the date of allowance of the credit must be the date of the Commissioner's decision that there had been an overassessment because after that nothing remained to be done except routine or ministerial acts (Nos. 42, 43, Br. 8, 24), it would be sufficient to reply, *first*, that regardless of the character of the acts remaining to be done, there can be no final allowance of a credit until the amount has been determined by the officer authorized by law to make the allowance (*ante*, 13-19), and *second*, that the same argument was made, without success, as regards both credits and refunds, in the *Girard Trust Company Case*.[1]

[1] "Thereafter [i. e., after the Commissioner's decision that there had been an overassessment] it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit." (Sup. Ct., Oct. Term 1925, No. 137, Brief for United States, pp. 13-14.)

But the things remaining to be done after the Commissioner decides that there has been an overassessment, before a credit or refund is finally allowed, are *not* all routine or ministerial. Thus, before any part of an overpayment can properly be withheld as a credit against assessments for other years reported by the Collector as unpaid, the Commissioner must determine whether those unpaid assessments are legally collectible. (See Law Opinion 1095, Cum. Bul. I-1, p. 313.)[1]

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[1] The specific question there was whether an overpayment can be applied as a credit against an assessment which is not legally collectible because of the running of the statute of limitations. Holding that it cannot be, the opinion states:

"To adopt a contrary holding would result in the Government in many instances taking advantage of its own wrongdoing, as the section is mandatory and the Commissioner is required to apply an overpayment of taxes for one year to an underpayment for a different year. Thus, if pursuant to an additional assessment a tax is collected in an amount greater than thereafter found due and the taxpayer happened to owe a tax which could not be collected by assessment or suit, the Government having come into possession of the money would be required to keep it and apply it against such unenforceable claim.

* * * * * * *

"It is therefore held that an amount refundable under section 252 of the Revenue Act of 1921 can not be applied against a tax which can not be collected either by assessment or suit due to the running of the statute of limitations." (Pp. 314, 315.)

6. THE CONTENTION THAT A CREDIT TAKES EFFECT AS A PAYMENT WHEN THE COLLECTOR, AFTER RECEIVING THE SCHEDULE OF OVERASSESSMENTS, ENTERS ON HIS BOOKS THE AMOUNT SUBJECT TO CREDIT AS ASCERTAINED BY HIM AND CERTIFIED TO THE COMMISSIONER.

As has appeared, after the Collector received the Schedule of Overassessments he ascertained from his books whether any part of the overassessment had been paid, and if so how much of the overpayment was subject to refund or credit, as the case might be, and certified these amounts to the Commissioner on the Schedule of Refunds and Credits. (*Ante*, 30, 36-37.) The certificate reads: "An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability *subject* to refund or credit." (Nos. 42, 43, Govt. Br. Appendix B-2.) [Italics ours.]

At or about the same time the Collector entered on his books the amounts so certified to the Commissioner as "subject to refund or credit," and the contention is that when he made those entries the credit was taken, i. e., became effective as a payment. (No. 56, Govt. Br. 7-11; No. 113, *Pottstown Iron Co.* v. *United States*, Govt. Br., 4-6.)[1]

But a credit cannot take effect as a payment before it is allowed by the Commissioner. And since it is not allowed until the Collector's report of the amount subject to credit has been approved by the Commissioner (*ante*, 13 *et seq.*), the entries in the Collector's books

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[1] "The Government contends that in each case the credit was taken and the tax paid when the Collector entered the credit on his records of the taxpayer's indebtedness." (No. 113, Govt. Br. 5.)

are necessarily only provisional until that time, and this Court so construed them in the *Girard Trust Company Case.* (*Ante,* 12-13.)

In *Peerless Paper Box Mfg. Co.* v. *Routzahn,* 22 F. (2d) 459 (N. D. Ohio), *Brady* v. *United States,* 24 F. (2d) 205 (D. Mass.), and *Boston Pressed Metal Co.* v. *United States,* 42 F. (2d) 312 (Ct. Cl.), cited in the Government's brief, the question when a credit is allowed or taken was not in issue.[1]

As for the Court of Claims, it has consistently held in a series of cases that a credit is taken when allowed, i. e., when the Commissioner approves the Collector's report on the Schedule of Refunds and Credits showing the amounts "subject to refund or credit." (*Pottstown Iron Co.* v. *United States,* 69 Ct. Cl. 427, 40 F. (2d) 142, now pending in this court as No. 113; *West Leechburg Steel Co.* v. *United States,* 69 Ct. Cl. 461, 40 F. (2d) 131; *Atlas Powder Co.* v. *United States,* 69 Ct. Cl. 558, 40 F. (2d) 136; *Andrews Steel Co.* v. *United States,* — Ct. Cl. —, 42 F. (2d) 573.)

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[1] Besides, in the *Peerless Paper Box Mfg. Co. Case,* which the *Brady Case* followed, the language of the opinion shows that the Court apparently understood that the entry of the amount of the credit by the Collector took place after the Commissioner had signed the Schedule of Refunds and Credits. Thus: "At the time the defendant collector applied the sum determined as overpayment for 1918 to the credit of the second additional assessment of 1917, he paid the accumulated interest thereon to the plaintiff." (P. 460.) Admittedly the check for interest upon amounts credited does not go to the Collector for delivery to the taxpayer until after the Schedule of Refunds and Credits has been signed by the Commissioner. (No. 56, Rec. 15-16.)

In the *Pottstown Iron Company Case,* now pending in this Court as No. 113, the Government contended in the Court of Claims that the credit was not taken "until plaintiff received the Certificates of Overassessment and the refund checks" (Govt. Br., Ct. Cl., p. 57),—which was not only after the Collector entered on his books the amount reported to the Commissioner as subject to credit, but after the Commissioner had approved the Collector's report by signing the Schedule of Refunds and Credits (*Ante,* 4-5.) And in the *West Leechburg Steel Company Case,* heard during the same term as the *Pottstown Iron Company Case* and decided on the same day, the Government likewise contended "that the credit was taken by plaintiff [taxpayer] when plaintiff [taxpayer] received the Certificate of Overassessment advising of the amount credited and the amount to be refunded, together with the refund checks," adding:

> "This contention is in accordance with the uniform practice in the Income Tax Unit."[1] (Govt. Br., Ct. Cl., p. 82.)

So that the contention now made—that the credit was taken when the Collector entered on his books the amount certified to the Commissioner as *subject* to credit—is not only contrary to that made in the Court below, but, according to the Government's own statement, contrary to the uniform practice of the Treasury Department.

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[1] Reg. 69, art. 1302, and Reg. 74, art. 1252, provide: "Overassessments and overpayments of income and profits taxes will be adjusted by means of Certificates of Overassessment." See also Reg. 62, art. 1031 (a), and Reg. 65, art. 1302.

Point II.

Where the tax is paid by the allowance of a credit the statutory period of four years from the date of payment of the tax within which to file claims for refund does not start running until notice of the allowance is received by the taxpayer, which in the present case was not earlier than September 26, 1923, the date of the Certificate of Overassessment.

Treasury Regulations 62, Art. 1035, under the Revenue Act of 1921, then in force, expressly provided that "due notice will be given * * * the taxpayer of the action taken on the claim."

The taxpayer's first and only notice that a credit has been allowed is the Certificate of Overassessment[1] (Finding XI, Rec. 16), and that is not sent to him until after the Commissioner has received from the Collector and approved the Schedule of Refunds and Credits. (*Ibid.*) Until then the whole matter remains locked in the breast of the Commissioner. "The schedule of assessments which the Commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail." (*Michel* v. *United States*, 37 F., 2d, 38, 39, C. C. A. 2d.)

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[1]As just noted (*ante*, 55), the regulations provide that "Overassessments and overpayments of income and profits taxes will be adjusted by means of Certificates of Overassessment."

Nor is there any limit to the time which may intervene between the signing of the Commissioner's authorization to the Collector on the Schedule of Overassessments, and the signing of the Schedule of Refunds and Credits, or between the signing of the latter and the mailing of the Certificate of Overassessment. All that is entirely within the control of the Commissioner. In the present case seven months elapsed between the signing of the Schedule of Overassessments and the signing of the Schedule of Refunds and Credits, and nearly a month more before the taxpayer was notified of the Commissioner's action by receipt of the Certificate of Overassessment on or about September 26, 1923.

Therefore, where payment of a tax is effected by crediting against it an overpayment for another year, unless the period of limitations for filing claims for refund does not begin to run until the taxpayer receives notice of the credit as provided by the regulations, the time would be running against him without his having any means of knowing it. In other words, by delaying notice to the taxpayer the Commissioner could cut down at will the statutory period of limitations. "It would require plain and compelling language to justify so incongruous a result * * *." (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, 73 L. ed. 410, 415.)

While not expressly provided in the statute that where payment is by credit the period of limitations shall not begin to run until the taxpayer receives notice of the credit, "the statute of limitations may be suspended by causes not mentioned in the statute itself." (*Braun* v. *Sauerwein*, 10 Wall. 218, 222, 19 L. ed. 895, 897.)

Compare *Michel* v. *United States, ante,* where the Circuit Court of Appeals, 2nd Circuit, held that the period prescribed by Revised Statutes § 3226, as amended, within which to bring suit on a claim for refund, namely, two years from the disallowance of the claim, does not commence to run until the taxpayer has received notice of the disallowance as provided for by the statute. A like decision was made by the District Court, Northern Ohio, in *Mahoning Coal R. Co.* v. *United States,* 28 F. (2d) 917.

POINT III.

Regardless of whether the claim for refund filed September 3, 1927, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period,[1] was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, but granting that it was not, it could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927.

1. Revised Statutes, § 3226, U. S. Code, Title 26, § 156, provides that no suit shall be maintained for the recovery of erroneously or illegally collected internal-revenue taxes

> "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

The "provisions of law in that regard," so far as applicable in the present case, are § 252 of the Revenue

[1] Finding VII, Rec. 13.

Act of 1921 and § 284 (b) (1) of the Revenue Act of 1926, neither of which lays down any requirements as to the form or contents of such claims. Each provides merely that no refund or credit shall be allowed after a specified time (five years from the date when the return was due, or four years from the date the tax was paid),

> "unless before the expiration of such period a claim therefor is filed by the taxpayer."

The original claim for refund in this case was made out on the prescribed departmental form and stated a number of different grounds—all in short, informal language. The particular ground in question, reading, "Foreign Dividends Overstated" (Pet., Ex. A, Rec. 8, 9), while abbreviated like the rest, could mean only one thing—that dividends received from a foreign company or companies which were not a part of Swift and Company's taxable income for 1917 had been included as such in determining its tax liability for that year.[1]

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[1] The opinion of the Court of Claims is in error in stating (Rec. 18) that the original claim alleged "as a ground for the refund that the stock dividends in question should have been allocated to other years than 1917." As stated, the ground for refund alleged was that certain dividends received from foreign companies had been erroneously included in computing the taxpayer's income for 1917. True, one of the arguments in support of that ground was that the dividends had been specifically declared out of earnings for prior years. (Finding VIII, Rec. 13.) But that contention was no more apparent on the face of the claim than the contention now made that one of the dividends was a stock dividend.

This was a sufficient statement of the ground of claim to meet the condition of the statute that no refund or credit shall be allowed after five years from the date when the return was due, or four years from the time the tax was paid, as the case might be, "unless before the expiration of such period a claim therefor is filed by the taxpayer." (*Ante*, 59.)

While the statement was general, it was no more general than the statement of claim in a large class of actions at law.[1] Just as in those actions, the details of the claim could be supplied and were supplied in supplemental statements in the nature of bills of particulars.

True, Treasury regulations provide that claims for refund shall set forth "*all* the facts relied upon in support of the claim" (Reg. 62, art. 1036; Reg. 69, art. 1304); and from this it is argued that the claim here is insufficient to support the present suit because "it gave the Government officials no indication that a refund would be sought on the ground that a stock dividend was erroneously taxed." (Govt. Br. 13.)

But the Commissioner of Internal Revenue could waive the requirements of the regulations (*Tucker* v. *Alexander*, 265 U. S. 228, 231, 72 L. ed. 253, 256), and at the time this claim was filed it had become the settled practice to waive them, even to the extent of per-

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[1] In *indebitatus assumpsit*, "It was enough to allege the general nature of the indebtedness, as for goods sold, money lent, money paid at the defendant's request, money had and received to the plaintiff's use, work and labor at the defendant's request, or upon an account stated, and that the defendant being so indebted promised to pay. This was the origin of the common counts." (Ames Lectures on Legal History, pp. 153-154.)

mitting claims to be amended so as to assert new grounds for refund after the period of limitations had expired.[1]

In the present case, moreover, the Commissioner waived the requirements again when he took cognizance of the claim notwithstanding its generality (*Howbert* v. *Penrose* and *Penrose* v. *Howbert*, 38 F., 2d, 577, 580, C. C. A. 10th; *Lehigh & Wilkes Barre Coal Co.* v. *United States*, 38 F., 2d, 637, 638-639, Dist. Ct. N. D. Pa.), considering and overruling the theory or contention first advanced in support of it, namely, that the dividends in question should not have been included in Swift and Company's taxable income for 1917 because declared out of earnings for prior years. (Finding VIII, Rec. 13.)

Besides, the original claim for refund *did* give notice of the ground of claim asserted in the present suit, namely, an overpayment of income and excess profits taxes for 1917 caused by including as a part

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[1] In *Magnolia Petroleum Co.* v. *United States*, 63 Ct. Cl. 173, 188, the parties stipulated and the Court found that: "It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III-1, page 350."

of the taxpayer's income for that year a dividend which was not such. While a new theory as to why the dividend was not a part of the taxpayer's income for 1917 is now advanced, namely, that it was a stock dividend, a claim for refund is not required to give notice of all the possible legal theories or contentions that may be advanced in support of it, but only of the *ground* of the claim in the sense that a declaration or a complaint at law or in equity gives notice of the cause of action. There is a distinction between a new claim or cause of action and a new legal theory in support of the same claim or cause of action. (See *post*, 67-71.)

2. Granting that the original statement of claim was not sufficient of itself, and that its defects were not waived, it could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927. (Pet., Ex. B, Rec. 10-11.) In other words, it was sufficient to stop the running of the statute of limitations.

Under the Treasury's own practice—

> "Even in the case of refund claims, where regulations in reference thereto are required by the statute, the Bureau, following the opinion of the Attorney General (14 Op. A. G. 615), has *consistently* held that an informal claim is sufficient to stop the running of the statute of limitations." (G. C. M. 499, Cum. Bul. V-2, 171, 173.) [Italics ours.]

> "In every case where an informal claim has been recognized there has been some writing submitted by the taxpayer setting forth the *general nature of his claim or information that*

> *would indicate a possible error in the computation of the tax liability* for the taxable year for which the overpayment was made." (G. C. M. 4355, Cum. Bul. VII-2, 175.) [Italics ours.]

This is but applying to claims for refund of illegally collected taxes the rule of law that where an action has once been commenced, even though the statement of the cause of action be imperfect or incomplete, an amendment making corrections or supplying omissions, whether filed before or after the statute of limitations has run, relates back to the commencement of the action.

In *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, 226-227, 70 L. ed. 242, 247, it was held that a complaint against a carrier before the Interstate Commerce Commission praying reparation on account of unreasonable rates, which did not set forth the points of origin and destination, or the dates of the shipments, or the quantities shipped, or the charges paid, or any other particulars of the claim, could be perfected by amendment after the statute of limitations had run. The opinion states:

> "It is true that the two-year requirement is jurisdictional. United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. ed. 914, 38 Sup. Ct. 408. *But no statute or rule imposes upon the commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars.*" (269 U. S. 226-227, 70 L. ed. 247.) [Italics ours.]

In *Illinois Surety Co.* v. *United States,* 215 Fed. 334, C. C. A. 4th, aff. 240 U. S. 214, 60 L. ed. 609, a suit by subcontractors in the name of the United States under the Act of Congress of August 13, 1894, an amendment supplying admittedly essential allegations (215 Fed. 338-339) was allowed over objection after the expiration of the one-year period of limitations, this Court saying:

> "No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, and in this there was no error. Rev. Stat. § 954, Comp. Stat. 1913, § 1591; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134." (240 U. S. 222-223, 60 L. ed. 615.)

In *United States* v. *Dellispine,* 15 Pet. 319, 10 L. ed. 753, the original petition was defective in substance, and an amended petition was allowed to be filed over the objection that the period of limitations had expired. This Court approved, saying:

> "• • • although the first petition was informal, and defective in substance, still, it would be too strict to say it was not the commencement of the proceeding, but that the amendment allowed by the Superior Court, in November, 1833, should be taken as the date when the claim was first preferred." (15 Pet. 329, 10 L. ed. 756.)

Applying the rule to the present case, the original claim for refund included a number of different grounds, as we have seen. The particular ground of claim in controversy, reading, "Foreign Dividends

Overstated," could only mean, as before stated, *that amounts had been included in the taxpayer's return of income for* 1917 *as dividends received from a foreign company or companies which should not have been included because not a part of income for that year.*

This, certainly, was sufficient to indicate the general nature of the claim. It was not a mere statement that taxes had been collected "in excess of the amount legally due." On the contrary, it specified the item of income that had been overstated, namely, dividends received from foreign companies.

The amended claim in alleging the name of the company paying the dividend, the amount thereof, and the reason why it was not income of the taxpayer for 1917, namely, because it was a stock dividend, supplied the particulars of the claim.

Of course, a statement of claim or complaint cannot be amended after the statute of limitations has run so as to state a new claim or cause of action.

The distinction between an amendment which merely amplifies or corrects the original statement of claim and one which states a new claim is illustrated by *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 60 L. ed. 1006, an action under the Federal Employers' Liability Act. In that case, "the original complaint was exceedingly brief and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce." (241 U. S. 292-293, 60 L. ed. 1008.) After the statute of limitations had run, the trial court, "over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce." (241 U.

S. 293, 60 L. ed. 1009.) This Court sustained the trial court, saying:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. * * * But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested." (241 U. S. 293-294, 60 L. ed. 1009.)

The amended claim in the present case meets this test. It did not state a new cause of action. It merely amplified the cause of action originally stated by giving the name of the company paying the dividend, the amount of the dividend, and the reason why it was not income of the taxpayer for 1917.

In *Missouri, K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, 57 L. ed. 355, the original declaration was by the mother of an employee of the defendant, suing as sole heir and next of kin, and was based on a statute of Kansas giving a right of action for injuries resulting in death. Notwithstanding that the statute of limitations had run, an amendment was allowed in which the plaintiff asserted a right of action not only as sole beneficiary and next of kin but also as administratrix, and relied not only on the Kansas statute but also on the Federal Employers' Liability Act.

In *New York Central & Hudson River R. R. Co.* v. *Kinney*, 260 U. S. 340, 67 L. ed. 294, a complaint in an action under the Federal Employers' Liability Act which omitted to allege that the parties were engaged in interstate commerce—an essential element of the

cause of action—was allowed to be amended after the statute of limitations had run so as to make that allegation.

Referring to these cases this Court said in *B. & O. S. W. R. R. Co.* v. *Carroll, Admx.*, 280 U. S. 491, 494, 74 L. ed. 567, 574:

> "Each of these decisions proceeds upon the ground that the *amendment did not set up any different state of facts as the ground of action*, and therefore it related back to the beginning of the action. In the *Kinney* case it was pointed out that the original declaration was consistent with a wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, whichever law gave them that effect." [Italics ours.]

So, here, the amendment did not set up any different state of facts as the ground of claim. The amended claim and the original claim both alike sought a refund of 1917 taxes on the ground of the erroneous inclusion in the taxpayer's income for that year of the *same* dividend.

True, the reason alleged in the amended claim as to why it was erroneous to include the dividend in the taxpayer's income for 1917 was new, but a recovery on that theory was entirely consistent with the original statement of claim.

There is a distinction between an amendment which merely alleges a new theory or contention in support of the *same* claim or right of action and an amendment which sets up a *different* claim or right of action. (*Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, 71 L. ed. 1069, 1072; *Friederichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. ed. 1075, 1083; *United States* v.

California & O. Land Co., 192 U. S. 355, 49 L. ed. 476; *Clinchfield R. R. Co.* v. *Dunn*, 40 F. (2d) 586, C. C. A. 6th, certiorari denied Oct. 13, 1930, —— U. S. ——; 1 Corp. Jur. 1056-1057; *Clark on Code Pleading*, 1928, p. 518.)

In *Baltimore Steamship Co.* v. *Phillips*, the Court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. *The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.* The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action." (274 U. S. 316, 321, 71 L. ed. 1069, 1072.) [Italics ours.]

In *Friederichsen* v. *Renard*, a suit in equity to rescind a contract on the ground of fraud was converted after the statute of limitations had run into an action at law to recover damages. The theory of the original petition was that the plaintiff had elected to *disaffirm* the contract because of the fraud, and so was entitled to have it rescinded, with incidental damages. The theory of the amended petition was that the plaintiff had elected to affirm the contract, but nevertheless was entitled to damages for the fraud—not only a new theory but an inconsistent one. Upholding the amended petition this Court said:

> "The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement

> of that wrong in the amended petition cannot, in any just sense, be considered a new or a different cause of action.'' (247 U. S. 210, 62 L. ed. 1083.)

That is, the wrong done the plaintiff—the cause of action—was the fraud practiced upon him, and stating a new theory for obtaining redress was not stating a new or different cause of action.

In *United States* v. *California & O. Land Co.*, cited with approval in *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319-320, 71 L. ed. 1069, 1071, a bill in equity filed pursuant to an act of Congress to have certain land patents declared void on the ground or theory of a forfeiture for noncompliance with the conditions of the grant, and a subsequent bill to have the same patents declared void on the entirely *different ground or theory* that the lands covered by the patents were within an Indian Reservation and therefore not within the terms of the grant, were held to state the *same cause of action*, so that a judgment of dismissal in the first case barred the second.

In *Clinchfield R. R. Co.* v. *Dunn*, 40 F. (2d) 586, C. C. A. 6th, certiorari denied October 14, 1930, — U. S. —, the defendant was sued under the Federal Employers' Liability Act as the successor of the Carolina, Clinchfield & Ohio Railway Company for a tort committed by the latter. After the statute of limitations had run an amended petition was allowed to be filed which went on the theory that the defendant was liable, not as the successor of the Carolina, Clinchfield & Ohio Railway Company, but by the terms of a lease under which it operated the latter's railway. The Court, citing cases in this Court in support of its position, said:

> "* * * That the cause of action is supported by a different law, or by application of different principles, under the amendment, does not show that a different cause of action is declared upon. * * * Much latitude of amendment is properly allowed to save the cause of action, if possible, from the bar of limitations. This is especially so where, as here, there is reasonable ground for holding the amendment to be only an amplification and expansion of the cause of action, as the defendant itself must have always recognized it was intended to be prosecuted." (P. 587.)

So, in the present case, only *one* claim or right of action was asserted—*the right to recover an overpayment of income and war excess profits taxes for* 1917 *caused by including as a part of the taxpayer's income for that year a dividend which was not such.*

That was the gist of the original and of the amended statement of claim alike. The latter in asserting that the dividend was a stock dividend did not set up any new claim but merely advanced a new theory or contention in support of the claim already stated, i. e., a new theory or contention as to why the dividend was not a part of the claimant's taxable income for 1917.

It follows that the amended statement of claim related back to the filing of the original statement of claim and was not barred by the statute of limitations.

In cases like *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285, 39 L. ed. 983, the amended petition which was rejected stated a new and distinct *right of action* and not merely a new *theory or contention* in support of the right of action stated in the original petition. In that case, as observed in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Gray,* 101 Fed. 623, 631, C. C. A. 6th, "The stat-

ute which supported the claim made in the amended petition had created a cause of action entirely different from the one arising at common law, set up on the original petition. The court, upon that ground alone, held that there was a departure, and that the plea of the statute of limitations would therefore prevent the relief sought by the amended petition."

The Government makes two objections to the amended claim. The first, that the amendment attempts to introduce a new claim or cause of action (Govt. Br. 13), has just been answered. (*Ante*, —.)

The other objection is:

> "That the second claim is not an amendment of the first is further shown by the fact that the claim states that the money, of which the respondent seeks refund, was paid on September 6, 1923 (R. 11), which was after the date of the original claim. A claim for refund can relate only to taxes paid prior to the date of the claim." (Govt. Br. 13-14.)

Of course, a claim for refund can relate only to taxes paid prior to the date of the claim. But the statement that the money which the respondent seeks to have refunded was paid on September 6, 1923, is not correct. The money which the respondent seeks to have refunded, as the findings show (Finding VI, Rec. 13), is the $498,961.29 of 1917 taxes erroneously collected from it by reason of the inclusion of a stock dividend in its 1917 return. Taxes assessable against the respondent on the face of its 1917 return were due not later than June 15, 1918 (Revenue Act of 1917, § 14 (a); Reg. 33, art. 230), and, nothing appearing to the contrary, it will be presumed that they were collected when due. In fact, taxes assessed on that

return to the amount of $5,328,164.72 were paid on or about that date.

The statement in the second claim that *one* payment of 1917 taxes was made on September 6, 1923, referred to an additional assessment (Findings X, XII, Rec. 14, 16), and was merely to lay the foundation for the alternative contention that if the second claim should be read as stating a new claim, and not merely as an amplification of the first, it was still in time because filed within four years of the last payment of 1917 taxes.

This Court has said that the statute and regulations relating to claims for refund were devised, "not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial." (*Tucker* v. *Alexander,* 275 U. S. 228, 231, 72 L. ed. 253, 256.)

The original claim in this case, as amended, completely fulfilled this purpose. It not only stated the facts—the ground of claim—but the legal contention relied upon.

Conclusion.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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JANUARY, 1931.

APPENDIX.

Statutes and Regulations.

Revised Statutes, § 3226, as amended, U. S. C., Tit. 26, § 156, provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax * * * has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. * * *"

Section 252 of the Revenue Act of 1921 provided, with reference to crediting and refunding overpayments of income, war-profits and excess-profits taxes collected under the Revenue Act of 1917,

> "That if, upon examination of any return of income made pursuant to this act, * * * the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be cred-

> ited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Section 284 (b) (1) of the Revenue Act of 1926 provided:

> "No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *."

Subdivision (h) of the same section provided, with an exception not material here, that—

> "this section shall not bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, * * *."

Regulations 62, art. 1036, under the Revenue Act of 1921, provided:

> "Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *."

Regulations 69, art. 1304, under the Revenue Act of 1926, provided:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth in detail under oath. * * *."